



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT KISUMU

crim app 58 of 83

(Coram: Kneller & Hancox, JJ A & Chesoni Ag J A) CRIMINAL APPEAL NO 58 OF 1983

BETWEEN

HABIL JETI S/O OKORE APPELLANT

AND

REPUBLIC RESPONDENT

**(Appeal from a sentence of the High Court of Kenya at Kisumu (Schofield, J) dated 9th May, 1983
in Criminal Case No 37 of 1982)**

JUDGMENT OF THE COURT

The appellant, who had one conviction for an assault nine years later, was convicted by the High Court at Kisumu upon his plea of guilty to the offence of manslaughter and given two years imprisonment.

According to the facts stated in the High Court, and accepted by the defence, at about 2 pm. On Christmas Eve, 1978, the deceased Frederick Onyango, was in company with two of his friends at Maseno walking towards Mabundi. After passing the Ministry of Works Camp they met the appellant standing at a bus stop with three women. The deceased's two friends then entered into a quarrel with the appellant, and one of them cut the appellant on the shoulder with a knife. The deceased ran back to help them, and was himself fatally stabbed with the knife by the appellant. He died immediately, and the post mortem showed that the cause of death was shock and haemorrhage due to a cut wound in the left chest with a sharp weapon.

Only the testimony of one of the witnesses called at the preliminary inquiry, Jackton Aluse, bore much resemblance to the facts which were accepted in the High Court. He was not amongst the deceased's group, but saw the appellant, who is his cousin, at the bus stop on the Maseno main road with three women, whom he named, and identified as living in Ebulonga village, all of whom said they were going on a safari. We then went into a shop and, on emerging, saw three more people, who presumably included the deceased, walking along the road and then engage in an altercation with the appellant. He said he saw one of them beating the appellant on the face and the appellant fall down, and when he got up he (the appellant) drew a knife from inside his trousers and stabbed the other man with it.

The other two eye witnesses, Noel Okuta and James Metho Osir, who were the deceased's companions, said at the preliminary inquiry that after passing the Ministry of Works Camp they met a group of three people, including the appellant. James Metho was walking slightly behind the other two. Suddenly the

appellant struck James Metho on the shoulder, and on being asked why he did this, the appellant drew a knife from a loose shirt he was wearing (also mentioned by Jackton Aluse) and stabbed the deceased, who had come back to see what was happening. In his own charge and caution statement to the police the appellant merely said that he did not kill the deceased but that they were attacked by him and two other people and a fight ensued. The appellant then disappeared and was not apprehended until November 18, 1981 at Kariobangi Estate, in Nairobi, by police officers acting on information received.

From the testimony of these three witnesses at the preliminary inquiry, therefore, there was no suggestion that the appellant was himself cut on the shoulder with a knife, which he then picked up, but showed that he was in the possession of it already. Nevertheless the facts presented to the High Court were more favourable to the appellant and we therefore propose to decide the appeal on that basis. Accepting, therefore, that the appellant did not have the knife initially, but was cut with it, we nevertheless cannot say that the sentence passed upon him for stabbing the deceased, when it was never suggested attacked the appellant, was in any way excessive. We do not think the facts showed that he was acting in self-defence as he suggested in his memorandum of appeal, which was in this respect inconsistent with the facts accepted by his legal adviser on his behalf before Schofield J. The appellant, was not shown to be appealing an attack by the deceased. Accordingly the appeal is dismissed.

Delivered at Kisumu this 23rd day of June, 1983.

AA KNELLER

JUDGE OF APPEAL

HANCOX

JUDGE OF APPEAL

Z R CHESONI

AG JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR